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No. 252

In the

# Supreme Court of the United States

OCTOBER TERM, 1958

SAFEWAY STORES, INCORPORATED,
*Appellant,*

*v.*

OKLAHOMA RETAIL GROCERS ASSOCIATION, INC., and LOUIE J. SPEED, INC.,
*Appellees.*

*On Appeal from the Supreme Court of the State of Oklahoma*

## APPELLANT'S BRIEF ON THE MERITS

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# INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 1-2 |
| Constitutional Provisions and the Statute Involved | 2-3 |
| Questions Presented | 3-4 |
| Statement of the Case | 4-13 |
| Summary of Argument | 14-17 |
| Argument: | |
| Question One | 17-36 |
| Question Two | 36-46 |
| Question Three | 46-50 |
| Question Four | 50-60 |
| Conclusion | 61 |

Page

## Cases

Advisory Opinion of the Justices, 132 A. 2d 47 (Me. 1957) ..... 33

Adwon v. Oklahoma Retail Grocers Assn., 204 Okla. 199, 228 P. 2d 376, 377 (1951) ..... 5

Appalachian Coals v. United States, 288 U. S. 344, 359-360 (1933) ..... 54

Balian Ice Cream Co. v. Arden Farms, 231 F. 2d 356, Cert. den. 350 U. S. 991 ..... 32

Balzar v. Caler, 74 P. 2d 839 (Cal. 1937) ..... 23

Ben Hur Coal Company v. Wells, 242 F. 2d 481, 486 (CA-10 1957), cert. den. 354 U. S. 910 ..... 32

Binderup v. Pathe Exchange, 263 U. S. 291 (1923) ..... 56

Bristol-Meyers v. Picker, 96 N. E. 2d 177, 179 (Ct. App. N. Y., 1950) ..... 44

Chicago Ry. v. McGuire, 219 U. S. 549, 567 (1910) ..... 34

Colgate-Palmolive Company v. Max Dichter & Sons, 142 F. Supp. 545 (D. C. Mass. 1956) ..... 44

Colgate-Palmolive Company v. Elm Farm Foods Co., 148 N. E. 2d 861 (Sup. Jud. Ct. Mass., 1958) ..... 44

Commonwealth v. Sisson, 60 N. E. 385 (Mass. 1901) 44

Commonwealth v. Zasloff, 13 A. 2d 67 (S. Ct. Pa. 1940) ..... 33

Connally v. General Construction Co., 269 U. S. 385 (1926) ..... 50

Day-Brite Lighting Inc. v. Missouri, 342 U. S. 421, 423 (1951) ..... 30

District of Columbia v. Gregory, 35 App. D. C. 271 (1910); cert. denied, 218 U. S. 673 (1910) ..... 42-43

District of Columbia v. Kraft, 35 App. D. C. 253 (1910), cert. denied 218 U. S. 673 (1910) ..... 42, 43

Page

Ellis v. Dallas, 248 P. 2d 63 (Cal. 1952) ..... 23

Engelbrecht v. Day, 208 P. 2d 538 (1949) ..... 25

Fairmount Creameries v. Minnesota, 274 U. S. 1 (1927) ..... 32

Fleetwood v. Read, 58 Pac. 665 (1899) ..... 43

Fletcher v. Peck, 6 Cranch 87, 139 (1810) ..... 30

Gamble v. Montgomery, 39 So. 353 (1905) ..... 42

Garner v. Teamster C & H Union, 346 U. S. 485 (1953) ..... 51

Gibbons v. Ogden, 9 Wheaton 210-211 (1824) ..... 51

Guss v. Utah L R B, 353 U. S. 1 (1957) ..... 51

Hill v. Florida, 325 U. S. 538 (1945) ..... 51

Hines v. Davidowitz, 312 U. S. 52, 67 (1941) ..... 51

Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, 426, 439-440, 442 (1933) ..... 24

International Union, U. S., A. & A. I. W. v. Russell, 356 U. S. 634 (1958) ..... 51

Lansburgh v. District of Columbia, 11 App. D. C. 512 (1897) ..... 42, 43

Lorain Journal Co. v. United States, 342 U. S. 143 (1951) ..... 56

Louisville Gas & E. Co. v. Coleman, 267 U. S. 32, 37 ..... 49

Millers Groceteria v. Food Distributors, 109 P. 2d 637 (Colo. 1941) ..... 23

Moore v. Mead's Fine Bread, 348 U. S. 115 (1954) ..... 58

Munn v. Illinois, 94 U. S. 113 (1877) ..... 31

McDermott v. Wisconsin, 228 U. S. 115 (1913) ..... 52

Napier v. Atlantic Coast Line R. Co., 272 U. S. 605 (1926) ..... 53

Page

Nebbia v. New York, 291 U. S. 502 (1934) ..... 14, 24, 25, 26, 31, 33

New State Ice Co. v. Liebmann, 285 U. S. 262 (1932) ..... 26

Oilure Mfg. Co. v. Pidduck-Ross Co., 80 Pac. 276 (1910) ..... 43

Pitney v. Washington, 240 U. S. 387, 60 L. Ed. 703 (1916) ..... 42

Rast v. Van Deman, 240 U. S. 342 (1916) ..... 42, 43

Ribnik v. McBride, 277 U. S. 350, 360 (1928) ..... 28, 31

Savage v. Jones, 225 U. S. 501, 529 (1912) ..... 51

Schwegmann Bros. v. Calvert Distillers Corp., 341 U. S. 384 (1951) ..... 54

Shelley v. Kraemer, 334 U. S. 1, 10 (1947) ..... 34, 47

Sinnot v. Davenport, 22 Howard 227 (1859) ..... 51

Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173, 176 (1942) ..... 53, 55

Sperry & Hutchinson Co. v. Melton, 71 S. E. 19 (1911) ..... 43

Sperry & Hutchinson Co. v. State, 122 N. E. 584 (1919) ..... 43

Sperry & Hutchinson Co. v. Tacoma, 122 Pac. 1060 (1912) ..... 43

Standard Oil v. F. T. C., 340 U. S. 231, 248 (1951) ..... 28, 58

State v. Crosby Bros., 176 Pac. 321 ..... 43

State v. Merchants Trading Co., 38 So. 443 (1905) ..... 43

State v. Packard-Bamberger & Co., 8 A. 2d 291 (S. Ct. N. J. 1939) ..... 32-33

State v. J. M. Seney Co., 107 Atl. 189 ..... 43

State ex rel. Sperry & Hutchinson Co. v. Weigle, 166 N. W. 54 (1918) ..... 43

Page

State v. Underwood, 71 So. 513 ..... 43

State v. Wilson, 168 Pac. 679 (1917) ..... 43

State v. Wolkoff, 85 N. W. 2d 401 (Minn. 1957) ..... 32

Swift & Co. v. United States, 196 U. S. 375 (1905) ..... 56

Tanner v. Little, 240 U. S. 369, 60 L. Ed. 691 (1916) ..... 42

Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 440-441 (1906) ..... 47

Tyson & Bro. v. Banton, 273 U. S. 418, 451 (1926) ..... 28

Ullman v. United States, 350 U. S. 422, 428 (1955) ..... 34

Union Brokerage Co. v. Jensen, 322 U. S. 202, 207 (1944) ..... 51

United Construction Workers v. Laburnum Construction Corp., 347 U. S. 656 (1954) ..... 51

United States v. Frankfort Distilleries, Inc., 324 U. S. 293, 298 (1945) ..... 54

United States v. International Boxing Club, 348 U. S. 236, at p. 241 (1955) ..... 56

United States v. Line Material Co., 333 U. S. 287, 309-310 (1948) ..... 54

United States v. Yellow Cab Co., 332 U. S. 218, 226 (1947) ..... 54

Weber v. Anheuser-Busch, 348 U. S. 468 (1955) ..... 51

Wiley v. Sampson-Ripley Co., 120 A. 2d 289 (Me. 1956) ..... 23

Williams v. Standard Oil Co., 278 U. S. 235 (1928) ..... 26

Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522 (1922) ..... 26

Yick Wo v. Hopkins, 118 U. S. 356, 369 (1885) ..... 47

Page

**United States Constitution**

Article VI, Clause 2 ..... 2

The Fourteenth Amendment ..... 2

**U. S. Statutes**

Clayton Act, 15 U. S. Code 13, et seq. ..... 4

Federal Trade Commission Act, 15 U. S. Code 41, et seq. ..... 4

McGuire Fair Trade Act, 15 U. S. Code 45 ..... 55, 59

Miller-Tydings Act, 15 U. S. Code 1 ..... 55

Packers and Stockyards Act (7 U. S. C. 181) ..... 59

Robinson-Patman Act (15 U. S. Code 13a, et seq.) ..... 4, 16, 57

Sherman Act, 15 U. S. Code 1, et seq. ..... 4, 16, 53, 55

**Oklahoma Statutes**

Oklahoma Unfair Sales Act (Oklahoma Statutes, 1951, Title 15, Chap. 14, Sections 598.1 through 598.11) ..... 2

Page

**Miscellaneous**

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Albert J. Beveridge's The Life of John Marshall, Volume III, Ch. 10 ..... 30

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"How Trading Stamps Affect Volume and Earnings", J. J. Trout, *Progressive Grocer*, Vol. 35 (8): 48-55 (Aug., 1956) ..... 39

Senate Document No. 4, 74th Congress, 1st Session ..... 57

Senate Resolution 244, 70th Congress ..... 57

Supermarket News, June 30, 1958, p. 1 ..... 27

Page

Competition From Retailers Issuing Trading Stamps Cannot be Met By Price Reductions Equivalent to Value of Stamps, *36 Texas Law Review*, 691, 694 45

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*On Appeal from the Supreme Court of the State of Oklahoma*

## APPELLANT'S BRIEF ON THE MERITS

## OPINIONS BELOW

The majority and the concurring and dissenting opinions of the Supreme Court of the State of Oklahoma (R. 632-647) are reported at 322 P. 2d 179.

## JURISDICTION

The opinions of the Supreme Court of Oklahoma were rendered on the 24th day of December, 1957. Appellant's

Motion for Rehearing was denied February 11, 1958. Notice of Appeal to the Supreme Court of the United States was filed with the clerk of the Supreme Court of Oklahoma on May 8, 1958. On July 2, 1958, for good cause shown, the Chief Justice of the Supreme Court of Oklahoma enlarged the time for docketing the case to and including August 4, 1958. The Jurisdictional Statement was filed August 4, 1958. Probable jurisdiction was noted October 13, 1958. The jurisdiction of this Court rests on 28 U. S. C. 1257(2).

## THE CONSTITUTIONAL PROVISIONS AND THE STATUTE INVOLVED

The case involves the Fourteenth Amendment, as follows:

> "* * * nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *U. S. Code, Constitution, Vol. I, p. XLV.*

Also involved is Article VI, Clause 2, of the Constitution of the United States, as follows:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof * * * shall be the supreme Law of the Land; and the Courts in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *U. S. Code, Constitution, Vol. I, p. XLIII.*

The Oklahoma Unfair Sales Act (Oklahoma Statutes, 1951, Title 15, Chapter 14, Sections 598.1 through 598.11)

is challenged as violative of the foregoing provisions of the Constitution of the United States.

## QUESTIONS PRESENTED

### ONE

Does the Oklahoma Unfair Sales Act violate the Due Process and Equal Protection clauses of the Fourteenth Amendment because it arbitrarily prohibits retail grocers from selling at prices set for the sole purpose of meeting prices of competitors selling the same articles at lawful prices and hence constitute an unnecessary and unwarranted interference with individual liberty?

### TWO

Does the Oklahoma Unfair Sales Act violate the Due Process and Equal Protection clauses of the Fourteenth Amendment because it prohibits a retail grocer from reducing his price to a price equal to the price charged by a competitor selling the same article less the value of trading stamps given by that competitor with the sale of that article and hence constitute an unnecessary and unwarranted interference with individual liberty?

### THREE

Does the Oklahoma Unfair Sales Act violate the Due Process and Equal Protection clauses of the Fourteenth Amendment because it arbitrarily permits the giving of trading stamps, cash register receipts, and other evidences of credit with retail sales at statutory cost, but wholly fails to fix any limit on the value the trading stamps, cash

register receipts, and other evidence of credit may have, prohibits the giving of money, or any other thing of value with retail sales at statutory cost, and as here applied fixes the maximum value that trading stamps, cash register receipts, or other evidences of credit given by appellant may have, while failing to fix the value for competitors of appellant?

FOUR

Are the actions by the Courts of the State of Oklahoma in this cause void because those Courts had no jurisdiction over the subject matter involved in the litigation, since the Congress of the United States had enacted the Sherman Act *(15 U. S. Code 1, et seq. Vol. 2, p. 1608)*, the Clayton Act *(15 U. S. Code 13, et seq., Vol. 2, p. 1611)*, the Federal Trade Commission Act *(15 U. S. Code 41, et seq., Vol. 2, p. 1621)*, and the Robinson-Patman Act *(15 U. S. Code 13a, et seq., Vol. 2, p. 1612)*, which laws made in pursuance of the Constitution of the United States are the supreme law of the land, and the Oklahoma Unfair Sales Act, as here applied, is in irreconcilable conflict with the aforementioned federal statutes and attempts to regulate the same conduct thus depriving appellant of due process and equal protection of the laws?

## STATEMENT OF THE CASE

The record here discloses a concise case history in contemporary retail competition. The trial, though brief, covers the events of several years. The Oklahoma Unfair Sales Act, declared void in 1949, because "* * * it punished a sale for less than cost regardless of any wrongful intent,"

was re-enacted in its present form and found valid in 1951. *Adwon v. Oklahoma Retail Grocers Association, 204 Okla. 199, 228 P. 2d 376, 377 (1951).* Because of the statute, two perplexing problems confronted the Oklahoma grocer.

The first problem was unique to the merchant in Oklahoma. It was brought about by the fact that this Act, by its language, permits the meeting of competition only if a competitor's price is at his statutory cost or above.

> "Any retailer or wholesaler may advertise, offer to sell, or sell merchandise at a price made in good faith to meet the price of a competitor who is selling the same article or product of comparable quality at cost to him as a wholesaler or retailer." Sec. 598.7.

All other Unfair Sales Acts permit the meeting of competition without restraint, or at least where the price being met is lawful. The question in Oklahoma was, when can the price of a competitor be met?

The second problem confronting the merchant was the re-entry into Oklahoma of trading stamps in 1952 and the legal effect of giving trading stamps with sales made at or near statutory cost.

This case has provided the resolution of these problems.

In the summary of the evidence which follows, the language used is taken from the record where practical, though not always quoted.

At the time suit was commenced in 1954, the total average weekly sales of food products in Oklahoma exceeded eight million dollars. Of this total, appellant sold approximately 17½%, from 85 different retail locations. Members of appellee Association sold over 30% of the total (R. 479).

For several years after re-enactment of the Unfair Sales Act, the parties to this suit cooperated, to some extent, in policing it (R. 111). When a member of the Association in competition with appellant was found to be price cutting, appellant notified Mr. Bowman, the Association's secretary-manager, who requested the member to get his prices in line (R. 112-113, 263). There continued, from time to time, price cutting by various merchants. If the price cutters failed to get their prices back in line, it was the policy of Safeway, until restrained by this court order, to meet those prices (R. 239). It was against appellant's general policy to sue any merchant and it did not bring injunction suits under this Act, despite the fact that competitors sold many items below cost, until it was restrained from meeting prices (R. 243). The Association did not file any suits before 1954 (R. 265).

There were eleven witnesses at the trial. Everyone in the grocery industry testified that it is necessary for a grocer to meet competitive prices on traffic items to stay in business. Mr. Kamp, a grocer in Oklahoma City and an officer and director of the Oklahoma Retail Grocers Association, said that you have to meet prices on traffic items but that it is not so important that you meet competition on other items (R. 125). John McCloud, an employee of Safeway for 22 years and price maker in the Oklahoma City Zone, when asked what would happen if a merchant did not meet his competitors' prices on traffic items, said, "Well, he would not have any customers" (R. 296). Mr. Morrison, president of Oklahoma Retail Grocers Associa-

tion in 1954 and a member of its board of directors, stated that the cooperative wholesale establishment from which he purchased suggested to its members that they meet competitive prices on traffic items, and said that in his opinion you can't stay in business unless you do (R. 350). He thought you have to meet traffic item prices day by day, item by item (R. 351).

Every grocer further testified that from his experience and in his opinion the mere meeting of the price of a competitor does not start price wars and is entirely appropriate. Mr. Kamp answered, when asked if meeting prices would cause a price war, "No, it won't," and when asked whether that was a proper practice, answered, "Yes, that is the way it ought to be." Asked if he approved of meeting prices, he answered, "I approve of that, yes, because we know there are certain items that have a small markup" (R. 127). He testified that in order to stay in business it is necessary to reduce prices on traffic items to the competitive level and if everybody else sets the same price, nobody is hurt (R. 128). Mr. Speed, president of a company operating three grocery stores, testified that he set his prices on traffic items in accordance with major competition (R. 165). Mr. Christensen, division manager of Safeway in Oklahoma and Arkansas, an employee of the company since 1923, stated that reducing prices to meet competition does not tend to divert trade (R. 218). Nor does it create price wars (R. 219).

With the exception of price cutting, the witnesses agreed that substantially uniform prices were being charged.

on all traffic items by nearly all grocers. Mr. Bowman stated that he did not think there was any appreciable difference in prices on traffic items (R. 117). Mr. Morrison testified that possibly 100% of the stores would be selling a specific traffic item at three for a quarter (R. 357).

The use of trading stamps increased in Oklahoma during 1952, 1953 and 1954. For instance, one company, Sperry & Hutchinson, had only two or three accounts in 1952 (R. 142). By October 1955, the time of the trial and a year after appellant was restrained from meeting stamp competition, Sperry & Hutchinson had grocery store clients in over 100 towns in the State of Oklahoma (R. 148).

As a result of the increase in stamp competition, appellant considered the advisability of reducing its prices on traffic items to a level equal to the price set by competitors less the value of stamps given by those competitors with the sale of the article. The stamps and double stamps on Wednesdays were being given with the sale of traffic items at statutory cost. Before reducing prices to meet the value of trading stamps given by competition, Safeway was advised by its Oklahoma attorneys that this conduct was permitted by the Oklahoma law (R. 230 and 239).

Appellant felt that it was at a competitive disadvantage when selling traffic items at the same shelf price charged by competitors giving stamps (R. 229). It made several surveys which showed that trading stamps were creating a diversion of traffic from appellant to stamp-giving stores

(R. 563, 564-571, 627-631). Safeway did not wish to give trading stamps to meet this competition because its president, Mr. Warren, like Mr. Kamp and other grocers, was very much opposed to them (R. 277, 464-466).

To offset the price cutting on traffic items by competitors and the effect of trading stamps, appellant reduced prices on approximately 200 non-traffic items, though not below statutory cost (R. 213). Reduction on these items seemed to have no appreciable effect on appellant's volume and did not appear to offset losses suffered to price cutting and trading stamp competition (R. 214).

Appellant then made an extensive survey of prices charged by competitors for various traffic items. It was made by actual purchases by company personnel, supported by cash register receipts and trading stamps received (R. 214). The survey showed that when the prices charged by the competing merchants surveyed were reduced by the value of the trading stamps, a substantial number of the items checked were being sold at prices apparently below statutory cost (R. 573-596).

Before reducing prices to meet trading stamp competition, appellant made another extensive survey of competitor prices. This survey showed some items were being sold by the merchants surveyed at prices below statutory cost before, and a substantial number after, reducing the price by the value of trading stamps or double trading stamps (R. 597 through 618). Appellant did not meet the prices on all the traffic items (R. 463). Instead, it selected the ones it thought the customers were familiar with the price

of (R. 258). Of the thousands of items stocked by appellant, only a handful of traffic items were reduced below statutory cost to meet competition (R. 258, 41-49).

All the witnesses questioned stated that in their opinion the customer got more when given a trading stamp than when not. Mr. Kamp said that he thought trading stamps reduced prices (R. 130). He said that reduction of prices to equalize the value of the trading stamps would be a proper method of meeting that competition, if lawful (R. 131). Mr. Morrison said that if the housewife saved the trading stamp and redeemed it, she got some extra value (R. 353). He testified that he had trading stamp competition for seven months before he decided to meet it by giving cash register receipts (R. 360). Mr. Peloubet, a C.P.A. and author of the many books and articles listed on pages 381-389 of the record, testified that he was a witness for the Sperry & Hutchinson stamp company, that he had testified in a number of other cases around the country for them, and that he did not feel there would be any difference between giving a trading stamp worth 2½ cents on the dollar and returning 2½ cents to the customer with a dollar purchase (R. 411). Mr. Peloubet further said that it is very unusual for the retail grocer to offer a cash discount and that he did not recollect any instance of its being done (R. 401). He was excluding the use of trading stamps, if they be a cash discount. It was agreed that if the purpose of giving the stamps was to receive prompt cash payment, then the stamp merchant was paying 36% per annum for the cash (R. 334, 432).

Counsel for Sperry & Hutchinson stamp company from New York conducted the entire examination of all the expert witnesses on the stamp issue for appellees. The vice-president and general counsel of Sperry & Hutchinson testified briefly. It was suggested that the way to meet trading stamp competition is by giving trading stamps (R. 244).

Most of the stamp-giving merchants sold on a strictly cash basis (R. 146, 489). Appellee Speed made no sales on credit in two of his three stores (R. 155). He gave trading stamps in all of his stores. It was stipulated that the stamps involved were worth not less than 2½ cents on each dollar purchase (R. 478). The record shows that the grocers with the greatest volume paid Sperry & Hutchinson 2% of gross sales for use of their stamps (R. 147, 159). When double stamps were given, the price to the merchant giving them doubled, or cost 4% of gross sales (R. 159). It was stated that if trading stamps do not result in a very substantial increase in volume, they cause the merchant issuing them to lose money (R. 324-325).

A U. S. Department of Commerce survey showed that for the year 1953 in supermarkets the average net profit before taxes was 2.35% of sales (R. 313). The Department of Commerce estimated that appellant made between 3 and 4% of the total grocery sales in the United States in 1954 (R. 315).

Suit was filed to enjoin appellant's sales below statutory cost and appellant was placed under a temporary restrain-

ing order on October 25, 1954. The order continued in effect through the trial on the merits in October of the following year. It prohibited appellant from selling below cost as defined in the Act without any exception.

The Association brought suits against about a half dozen other retail grocers at the same time this suit was instigated against appellant (R. 122). After it was enjoined, appellant filed a number of suits against competitors selling below cost (R. 111-112, 265). Appellant also commenced giving its own trading stamps, called Cash Savers, after the injunction against it issued (R. 270). On June 28, 1955 appellant filed a cross-action in this cause seeking to enjoin appellees from giving trading stamps with sales made at statutory cost.

Every price that appellant is charged to have set below statutory cost is set forth in Exhibit B of plaintiff's petition (R. 41-49). The record shows that it was stipulated that each price shown in Exhibit B was set to meet the price of competition. In the towns of Enid, Shawnee, Norman and Tulsa, the prices charged by appellant were stipulated to be "equivalent to, and equally low priced of one or more of its competitors established on a prior date in the town in which said articles were sold" (R. 200). All other prices were set to meet trading stamp competition. It was stipulated that the prices at which appellant sold these articles were reduced approximately 5.6% on Wednesdays and 2.8% on other days of the week below the shelf prices charged by competition giving trading stamps (R. 198, 200, 478). It was further stipulated that the prices

set by trading stamp competition were at or near the minimum price and that "if the stamps, valued at not less than 2.5%, had the effect of reducing the sales price at which the items were sold, then the resultant sales prices were less than the minimum allowed by the Oklahoma Unfair Sales Act" (R. 478).

At the close of the trial, the District Court enjoined appellant from meeting the prices of competitors selling at less than their cost and from reducing its prices below competitors' prices by an amount equal to the value of trading stamps given by those competitors where the reduction resulted in a price below statutory cost. The prohibition against meeting a competitor's price that is below cost applies whether or not the price met is in violation of the Act. The trial court refused to enjoin appellees from giving trading stamps with items sold at statutory cost and enjoined appellant from giving trading stamps having a value in excess of 3% of the sales prices of items sold at or near statutory cost (R. 449-453).

The Supreme Court of Oklahoma affirmed, stating appellant "* * * set illegal prices for the sole purpose of meeting prices of its competitors * * *." On the trading stamp issue it said "* * * we hold that the giving of such stamps would not constitute a price cut or unfair competition, but such stamps merely constituted a discount for cash" (R. 633 through 645). Four Justices concurred in part and dissented in part (R. 645-647).

## SUMMARY OF ARGUMENT

### QUESTION ONE

The Oklahoma Act is the only one of thirty such statutes that prohibits meeting all prices below statutory cost, whether lawful or unlawful.

The Oklahoma Courts have been confused by this meeting competition defense because it is the only one of its kind.

A violation of this Act has three elements; sale below cost plus 6%, unlawful intent and prohibited effect.

A competitor's price cannot be met where only the first element, sale below cost plus 6%, is present.

The prohibition against meeting lawful prices violates due process and equal protection.

There are many reasons why a grocer sells below cost plus 6% without any unlawful intent or prohibited effect.

The question does not involve unlawful prices, or sales with the purpose or effect of damaging competition.

Absolute price fixing statutes at least apply equally.

*Nebbia v. New York* is distinguishable.

This Act embodies no adjustment or accommodation to the principle it impinges or the circumstances in which it operates.

This statute paralyzes the regulative force of competition.

Property, including the right to compete, must be secured or liberty cannot exist.

The Fourteenth Amendment protects the economic liberty of our citizens.

## QUESTION TWO

Because of the Oklahoma Unfair Sales Act, competing grocers were selling the same grocery items at the same prices, the statutory minimum. Competitors of appellant gave trading stamps with their sales at the statutory minimum. Appellant met this competition by reducing prices on some items to offset the value of the stamps. From this it was enjoined. An injunction against giving stamps with sales at statutory cost was denied.

It is arbitrary and discriminatory to permit giving trading stamps with sales made at the statutory minimum while prohibiting a reduction in price by the value of the trading stamps, or the gift of cash or commodities.

Trading stamps are widely used in the grocery industry. They are effective competitively and this competition must be met.

A cash discount is a price reduction.

If appellant's competitors may give a cash discount in the form of a trading stamp, appellant may give a cash discount in cash.

The Oklahoma legislature did not contemplate the use of trading stamps.

It is arbitrary to force grocers to give stamps and consumers to pay for them.

## QUESTION THREE

Appellant is limited in the percentage of discount it can give with sales at cost to 3%. Its competitors are under no such limitation. The statute does not fix any limitation.

The injunction is a denial of equal protection of the laws.

The legislature cannot delegate to the courts the power to fix the percentage of discount because there would inevitably be inequal application.

Merchants must seek out the most effective trading stamp to use in their stores.

No standard is fixed by the Oklahoma statute on which citizens can base their conduct.

## QUESTION FOUR

The Oklahoma Unfair Sales Act is in irreconcilable conflict with the federal antitrust laws.

The federal antitrust laws encompass within their scope local retail sales by interstate chains.

The policy of the Sherman Act is to prevent restraints of trade and monopoly and to maintain price competition. The Oklahoma Act impairs the effectuation of that policy.

The Robinson-Patman Act has covered the very conduct sought to be regulated by the Oklahoma Act and has preempted the field.

The Federal Trade Commission has jurisdiction over the subject matter. The amendment enlarging the powers of this Commission to include the retail sales of meat in September 1958 further reveals federal preemption.

Oklahoma had no jurisdiction over the subject matter, because of the federal antitrust laws.

Because of the permanent injunction, the Courts of Oklahoma are exercising continuing control over appellant's prices.

Denial by the State of Oklahoma of rights conferred by federal law constitutes a violation of due process and equal protection of the laws.

## ARGUMENT

### QUESTION ONE

The issue raised in Question One is elusive. Its elusory nature arises in part because the Oklahoma legislature in drafting the statute under attack departed from the course of all other states in its meeting competition exception. Similar statutes enacted in three states contain no exception, apparently assuming that the purpose of meeting competition fairly negates any claim that the prices are established to injure competition.[1] Eight states except sales below cost set in good faith to meet competition or the prices of a competitor.[2] Seventeen states and the Territory

[1] Connecticut, Rhode Island, South Carolina.

[2] Arizona, Idaho, Kansas, Maryland, Massachusetts, Nebraska, Pennsylvania and Wisconsin.

of Hawaii permit good faith meeting of legal prices, legal competition or lawful competition.[3]

As now construed, and as here applied, the Oklahoma Act prohibits absolutely prices set to meet prices of a competitor selling below his statutory cost, whether such prices are lawful or unlawful.

Further difficulty in securing the issue derives from the ambiguous treatment of the meeting competition exception. As often as not, appellees and the Oklahoma courts have treated the exception as permitting the meeting of lawful prices. Thus the Association, in its reply to appellant's answer, states that the Act "* * * permits a retailer to meet the price of a competitor who is selling 'at cost to him,' i.e., at a lawful price" (R. 89). Judge Spellman, the trial judge, in his lengthy oral opinion, states, "A retailer may sell below his cost without violating this Act, to meet the lawful price of his competitor, but cannot sell below his cost on this excuse when the price of a competitor is an unlawful price * * *" (R. 440-441). The Supreme Court of Oklahoma falls into a similar ambiguity. While resting the very constitutionality of the Act on the requirement that an unlawful purpose exist, it equates a price set for the sole purpose of meeting a competitor's price with an unlawful purpose. It follows that prices below cost cannot be met, whether legal or illegal.

Obfuscated by the Court's holding is the admitted fact that prices below statutory cost are legal, absent the pur-

[3]California, Colorado, Kentucky, Iowa, Maine, Minnesota, Montana, New Hampshire, New Jersey, North Dakota, Oregon, Tennessee, Utah, Virginia, Washington, West Virginia, Wyoming.

pose and effect of injuring competition. Section 598.3 of the Act, which defines the offense, is captioned, "Sales Below Cost Prohibited in Certain Cases." A legal price cannot be enjoined.

A violation of this Act has three elements:

1. A sale below cost, computed by adding invoice or replacement cost, plus freight and cartage, plus state and federal taxes, plus a markup to cover the cost of doing business of 6% in the absence of proof of a lesser cost; and,

2. The intent thereby to injure competition; and,

3. As a result thereof, injury to competition.

Under the permanent injunction appellant is proscribed from meeting any price below the statutory cost of its competitors (R. 452).

Finally, the most abstruse aspect of this first question is the practical effect of the injunction. It is the measure of this effect that determines the validity of the Act.

In essence, the claim is that the Act prohibits merchants in Oklahoma from meeting lawful prices of competitors and that this prohibition is so arbitrary and discriminatory as to violate due process and deny equal protection.

The question does not involve the meeting of unlawful prices, or sales for the purpose or with the effect of damaging competition.[4]

[4] All Unfair Sales Acts require the showing of either an unlawful purpose or effect to constitute a violation. The Robinson-Patman Act, 15 U. S. C. A. §13a, prohibits sales made at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor." Senate Bill 11, 86th Congress, 1st Session, a proposed amendment to §2(b) of the Clayton Act, as amended, would prohibit the meeting of a competitor's price where "the effect of the discrimination" is to lessen competition.

What are the lawful prices that cannot be met? They are the prices below statutory cost where there is no unlawful purpose or effect. Statutory cost is substantially above the cost to the grocer of placing the item on the shelf for sale.

The purposes for which a grocer might sell below statutory cost without intending any injury to competition are innumerable. That the legislature intended to permit such sales is manifest. That the lawful purposes permitted far transcend isolated transactions involving seasonable goods, perishables, damaged items, liquidations, forced sales and the like, is illustrated by their specific exemption from the Act (Section 598.6).

Among the many reasons a grocer might sell at less than 6% above his actual cost are the promotion of goodwill, weekend and holiday specials, industry custom and practices, advertising, the promotion of particular brands or products, movement of overstocked items or slow moving items, introductory offers, the maintenance of historic price differentials among different items, to retain customers or market position.

While examples of the lawful prices which cannot be met are limitless, several might assist in evaluating this restriction.

A grocer sells sugar, flour, coffee, detergent, baby food and other traffic items at one cent above invoice cost which is less than statutory cost. His reason is he believes he makes more money on these items at this mark-up than he does on fresh caviar with a 60% mark-up because of the

difference in volume, ease of handling and absence of loss from spoilage. He wants his customers to be able to buy staple traffic items at the lowest figure which yields a fair return and does not result in subsidizing the cost of doing business in thousands of slow moving items on his shelves. He has no intention of diverting trade or injuring competition. His prices are lawful. They cannot be met.

A grocer sells at his statutory cost and gives trading stamps worth not less than 2½% of the prices of the groceries purchased. His competition is enjoined from meeting his net price. An injunction against his continuance of the practice is denied. This is, of course, what happened here in part.

A grocer buys Easter hams at 50 cents per pound and sells them at the same price throughout the week preceding Easter. He stocks 7,500 other items which have a mark-up varying from 0 to 60%. His store operates at a profit even if he gives the hams away. His sole purpose in selling the hams at his invoice cost is to make friends, create good will and to cater to the known appetite of his customers for Easter hams. He has not violated the Act. His price cannot be met.

A grocer buys grade A canned peaches at a very favorable price and sells them with a 10% mark-up. He lowers his price on grade B canned peaches below his statutory cost to maintain the customary price differential of three cents between grades A and B. Otherwise all his customers buy the grade A peaches at the cheaper price. He has not violated the Act. His price on grade B cannot be met.

Grocer A reduces his prices on a number of items below his cost to meet above-cost prices of Grocer B, a competitor. Grocer C is in competition with Grocer A, but not Grocer B, because of geographic location. Grocer A has not violated the Act. Grocer C cannot meet his prices.

A grocer is in a neighborhood of very low income families. He wishes to sell them bread at his invoice cost to permit his customers to buy it as cheaply as possible while he suffers no loss on its sale. He has not violated the Act. His price cannot be met.

Moreover, assuming the grocer meeting competition in each instance cited above has the purpose of diverting trade, can it be said that there results a tendency to deceive, to substantially lessen competition, or to unreasonably restrain trade, or tend to create a monopoly in any line of commerce? This is a question of fact that will never be in issue under this injunction.

Where is relief for the grocer who sues to enjoin his competitor from selling below cost, and the court holds there was no lawful intent or effect though sales are being made below cost? He cannot meet the price; he has failed to enjoin it. A more patent and harmful discrimination is difficult to imagine.

In scores of cases brought under Unfair Sales Acts, courts have refused to enjoin prices below statutory cost because an unlawful intent has not been established. Illustrative is a recent case in which the Supreme Court of Maine said:

> "Under this law the plaintiff was required to make out no more than a prima facie case. This was done

and the plaintiff rested. The defendant by necessity was forced to offer a defense and explain the purpose and reason for the sale. This was the only evidence as to what motivated the defendant's action and was not contradicted. The defendant's position is that the sale was not made to injure competitors or destroy competition, and its purpose was to make friends and create good will.

"The purpose was legitimate and is not covered by the Unfair Sales Law. It is a practice resorted to by merchants from time immemorial and recognized as proper by the courts and business generally. Where attempts have been made, as we have seen before in this opinion, to prevent it by legislation, such laws have been declared unconstitutional." *Wiley v. Sampson-Ripley Company, 120 A. 2d 289 (Me., 1956).*

In *Millers Groceteria v. Food Distributors, 109 P. 2d 637 (Colo. 1941)*, the defendant was found to have reduced prices below cost for the purpose of attracting attention to the opening of a new store. This was held to be a complete defense.

In *Balzar v. Caler, 74 P. 2d 839 (Cal. 1937)* and *Ellis v. Dallas, 248 P. 2d 63 (Cal. 1952)*, the defendants established as their purposes the stimulation of their own sales. The sales below cost were held legal, because there was no unlawful intent.

These cases only serve to illustrate the obvious.

An absolute prohibition against sales below cost in an industry as complex as this and in an economy as dynamic as ours would be paralyzing and crippling. The resulting crystalization and stagnation would destroy competition. But it would at least have the virtue of applying equal

justice (if justice it be) under law. The Oklahoma Act permits the sale below cost but prohibits competition from meeting it.

A comparison with the statute involved in *Nebbia v. New York, 291 U. S. 502 (1934)* reflects controlling distinctions. There the State was dealing with a single commodity, milk. "Save the conduct of railroads, no business has been so thoroughly regimented and regulated by the State of New York as the milk industry." *Nebbia v. New York, op. cit., p. 521.*

An emergency existed and the legislature considered various remedies. A joint legislative committee considered the problems for nearly a year. It held many hearings involving hundreds of witnesses and reports. Finally an act was passed creating a milk control board with power to fix the price to be charged by a store for a quart of milk. The measure was temporary to meet an existing emergency.

> "While emergency does not create power, emergency may furnish the occasion for the exercise of power * * * (426) and if state power exists to give temporary relief from the enforcement of contracts in the presence of disaster due to physical causes such as fire, flood or earthquake, that power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other and economic causes * * * (439-440). It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends (442)." *Home Building and Loan Assn. v. Blaisdell, 290 U. S. 398, 426, 439-440, 442 (1933).*

Comparison with the legislature history of the Oklahoma Unfair Sales Act is quite remarkable. The original Act, passed in 1941, provided in Section 6, along with the

other special exceptions to sales below cost, sales made in good faith to meet competition. On March 29, 1949, Justice O'Neill filed the opinion of the Supreme Court of Oklahoma first announcing its decision voiding the Unfair Sales Act, though the case was not finally decided until July of 1949. *Englebrecht v. Day, 208 P. 2d 538 (1949)*. On April 6, 1949, a week after the majority opinion in the *Engelbrecht* case was first filed, House Bill 488 was introduced in the Oklahoma legislature. It was referred to the House Committee on Business and Industry which made its "do pass" report on April 14. On April 26, 1949 the bill was passed by the House and sent to the Senate. The Senate passed the bill without amendment on May 11. It was sent to the Governor the following day and signed May 18, 1949. Thus the bill, from introduction to final passage, was in the legislature but 35 days. Only 50 days transpired from the first announcement that the Unfair Sales Act was unconstitutional until the Governor signed the new Act. There was no attempt to determine the need for the new legislation, no study was made of conditions in 1949, and no real consideration was given to the drastic change made in the meeting competition defense.

The *Nebbia* case starts with the proposition that "Under our form of government the use of property and the making of contracts are normally matters of private and not public concern. The general rule is that both shall be free of governmental interference." *Nebbia v. New York, op. cit., p. 523.*

Before *Nebbia*, the power of the state to fix prices in "private" businesses was denied because violative of due

process. *Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522 (1922); Williams v. Standard Oil Co., 278 U. S. 235 (1928); New State Ice Co. v. Liebmann, 285 U. S. 262 (1932).* In the only written dissent in these three cases, Justice Brandeis, with whom Justice Stone concurred, said:

*New State Ice Co. v. Liebmann, op. cit. at p. 302.*

> "A regulation valid for one kind of business may, of course, be invalid for another; since the reasonableness of every regulation is dependent upon the relevant facts * * *. Whatever the nature of the business, whatever the scope or character of the regulation applied, the source of the power invoked is the same. And likewise the constitutional limitation upon that power. The source is the police power. The limitation is that set by the due process clause, which, as construed, requires that the regulation shall be not unreasonable, arbitrary or capricious; and that the means of regulation selected shall have a real or substantial relation to the object sought to be obtained." *New State Ice Co. v. Liebmann, op. cit., at pp. 301-302.*

Moreover in *Nebbia*, while there were different prices on different types of milk, and for different types of sellers, each retailer was restricted to the identical price. One grocer was not permitted to charge less than his competitor and then given power to enjoin that competitor from meeting his lower price. Embodied in the Oklahoma Act is the germ that can destroy members of the industry the Act was designed to protect. Fixing prices can be justified in an emergency. Fixing prices which can be met while not fixing prices which can be set is a dangerous business.

The retail grocery industry operates on a smaller margin of profit than any industry in the economic history of

western civilization. The industry leaders rarely show a profit of one cent on each dollar of sales.[5] Department of Commerce statistics in the record show the industry average was less than 2½¢ per dollar of sales in supermarkets.[6] These sales include many thousands of different items. Some move very slowly, perhaps one a week. Others are sold by the hundreds every day. Some are relatively expensive and tie up capital. Some are easily damaged. Many are subject to spoilage. Volume sales, low overhead and low mark-up are standards of the industry. While location, good service and effective promotions are important to success, prices are the first concern of the consumer. All grocers who testified for the Oklahoma Retail Grocers Association stated positively that a grocer must have competitive prices on traffic items to remain in business.

As applied, the prohibition imposed below is clearly arbitrary and discriminatory. It embodies no consideration, accommodation or adjustment to the principles it impinges, the circumstances in which it operates, or the dire significance of its imposition. It is decisive, but unreasoning.

It denies the right to meet a price a competitor is free to set when meeting the price is essential to survival. The right is denied at the only level at which price competition is effective, since nearly all grocers are selling traffic items at statutory cost or below.

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[5]The industry leaders rarely make a 1% net profit on net sales. Supermarket News, the industry newspaper, in its June 30, 1958 issue, at page 1, reports that "for the first time in seven years A & P's ratio of net profits to net sales last year exceeded 1 per cent."

[6]Ratio of sales to profits is not determinative of profitability of the business since one merchant might make more sales at a lower cost of doing business.

The principle restricted is economic competition: the efforts of two, or more, parties acting independently, to secure the custom of third parties by the offer of the most favorable terms. "The heart of our national economic policy long has been faith in the value of competition." *Standard Oil v. F. T. C., 340 U. S. 231, 248 (1951).*

Today, more than at any time heretofore, we are able to recognize that the chief difference between our way of life and life under totalitarian governments is the effective competitive nature of our economy. Economically, ours is the most complex and productive nation in history. Every liberty we possess, every right we esteem, is contingent on the continuance of what Mr. Justice Stone called "the regulative force of competition." Stone, J., dissenting, joined by Holmes, J., and Brandeis, J., *Tyson & Bro. v. Banton, 273 U. S. 418, 451 (1926); Ribnik v. McBride, 277 U. S. 350, 360 (1928).* Far from being the subject matter of restriction, preservation or revitalization of the "regulative force of competition" is the very justification for price regulation by the state.

> "An examination of the decisions of this Court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community." Stone, J., dissenting in *Tyson & Bro. v. Banton, op. cit., 451.*

This statute paralyzes the regulative force of competition in this most competitive, price conscious industry. It is perma-

nent legislation, not designed to meet any present emergency.

Security of property is not a new value placed on constitutional government. Hamilton pointed out in *The Federalist, Number 79*, that "in the general course of human nature, a power over a man's subsistence amounts to a power over his will."

John Adams noted in his *Discourses on Davila* that "Property must be secured or liberty cannot exist."[7]

At the same time, John Taylor of Caroline County, Virginia, would say,

> "Blackstone has treated of the rights of persons and the rights of things; but the rights of man include life, liberty and property, according to the prevalent fashion of thinking in the United States. The last is the chief hinge on which social happiness depends. It is therefore extremely important to ascertain whether it is secured with the same principle with our other rights."[8]

Property is far more important today to the preservation of liberty than heretofore because man is far less independent economically. For the very necessities of life we are fully interdependent. The geographic frontier is gone.[9] It is replaced by the business frontier. The essence of the business frontier is competition. Without competition, the frontier is closed. This competition is more than an incident

[7]Reprinted in Coker, *Democracy, Liberty, and Property*, p. 466, The Macmillan Co., 1942.

[8]Taylor, *Construction Construed and Constitutions Vindicated*, reprinted Id., p. 496.

[9]This general idea tested against the writings of Frederick Jackson Turner elicits provocative thoughts. See Turners *The Frontier in American History*, Henry Holt, N. Y., 1920.

of the ownership of property. It is a fountainhead of property: the impartial method of reaping the harvest of labor and capital.

Of course, competition can be restricted. If need be, it can be suspended. The judiciary is tolerant toward the endeavors of our legislatures to cope with the terribly complex economic difficulties with which we are confronted. Experimentation is necessary to the solution of these problems. The United States Supreme Court does not sit as a superlegislature to weigh the wisdom of legislation, but "the legislative power has limits." *Day-Brite Lighting, Inc. v. Missouri, 342 U. S. 421, 423 (1951).*

The absolute prohibition of meeting lawful prices regardless of intent or effect has no rational basis. Can meeting a lawful price be an unfair sale? The operation of the statute is wholly arbitrary and is not designed to accomplish any policy that the legislature is free to adopt. The critical gap between the price which can be met and the price which can be enjoined is destructive of property.

There is a constitutional guarantee against arbitrary and discriminatory acts of legislatures affecting property rights and business liberties of citizens. In *Fletcher v. Peck, 6 Cranch 87, 139 (1810),* Chief Justice Marshall announced what his biographer has eulogized as, "* * * fundamental principles for the guidance of the States and the stabilizing of American business." Albert J. Beveridge, *The Life of John Marshall, Volume III, Ch. 10.* Countless cases have considered the power of the state over the economic liberty of its citizens. A certain ebb and flow in the degree of

state interference permitted is discernible. As examples compare *Munn v. Illinois, 94 U. S. 113* in 1877 to *Ribnik v. McBride, 277 U. S. 350* in 1928 to *Nebbia v. New York, op. cit.* in 1934.

For a number of years, the highest courts of the several states have struggled with statutes restrictive of competition. They have disagreed and divided. Many statutes have fallen in the last few years. Among the fallen are sales below cost acts.[10] To date, this Court has not considered such a statute.[11]

Heretofore no sanction of government has prohibited a merchant from meeting the legal prices of his competitors selling the same goods in the same market.

This is a most remarkable departure from all precedent. The economy of this nation has enjoyed no right more fundamental than the equal right to compete.

Elsewhere courts have viewed the matter differently.

> "One who reduces his prices in defense of his economic life cannot be guilty of eliminating competition or

[10]The statutes may be divided as to types. The various types developed contemporaneously and are similar in purpose.

Forty-five states now have or have had Fair Trade Acts. The constitutionality of roughly two-thirds of these has been tested and half have failed to meet the test. The following states have voided these Acts: Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Nebraska, New Mexico, Ohio, Oregon, South Carolina, Utah and West Virginia. Four of these fell in 1957.

The constitutional test of below cost sales acts has been less frequent. Even so, eight of these acts have been invalidated by the following states: Arizona, Colorado, Kansas, Maine, Maryland, New Jersey, Oklahoma, Pennsylvania. Oklahoma and Pennsylvania statutes were re-enacted after correcting some constitutional defects.

Related acts, including geographic price discrimination and special industry laws, have been stricken in numerous instances.

[11]The trade mark-property rights justification for the Fair Trade Acts is absent here.

his competitors." *Ben Hur Coal Company v. Wells, 242 F. 2d 481, 486 C. A.-10, 1957, cert. den., 354 U. S. 910 (1957).* Cf. *Balian Ice Cream Co. v. Arden Farms, 231 F. 2d 356, cert. den., 350 U. S. 991 (1955).*

"The fact that competitors were charging the same or lower prices for a reasonable time before and after the alleged violation was valid evidence that the defendants' prices did not, and even could not, have the effect of injuring such competitors or destroying competition in the market involved." *State v. Wolkoff, 85 N. W. 2d 401 (Minn., 1957).*

The impact of the reasoning behind these opinions is further enhanced where the prices being met are lawful and there is no difference between sellers forming a rational basis for the discrimination.

While not involved here, and lacking the discriminatory qualities present in the Oklahoma Act, it is doubtful that an absolute price fixing statute of such sweeping scope and magnitude could stand. Bronson Alcott might compose a constitution for the regulation of the universe in perpetuity on a scrap of parchment a century ago, but modern society is not so simple. It is one thing to fix prices on milk temporarily to meet an emergency: quite another to fix minimum prices on every item stocked by every wholesaler and every retailer in a state without any consideration, accommodation or adjustment to the principles it impinges, the circumstances in which it operates, or the significance of its imposition.

Illegal intent is essential to the constitutionality of Unfair Sales Acts. *Fairmount Creameries v. Minnesota, 274 U. S. 1 (1927); State v. Packard-Bamberger & Co., 8*

*A. 2d 291 (S. Ct. N. J., 1939); Commonwealth v. Zasloff, 13 A. 2d 67 (S. Ct. Pa., 1940); Advisory Opinion of the Justices, 132 A. 2d 47 (Me., 1957).* Oklahoma expressly recognizes this, but it has said meeting competition selling below cost is in itself the illegal purpose. A grocer in Oklahoma can sell below his cost and invoke the aid of the State to prohibit his competitors from meeting his price.

Time has forged a dichotomy between what are thought of as the rights of man and the rights of property. The split has become so great that many claim the rights of property are not constitutional rights. Some took the decision in *Nebbia v. New York, op. cit.*, as the *coup de grace* of the doctrine of constitutional guarantee of freedom from arbitrary or discriminatory legislation in the field of business and economic regulation. Since 1934 this Court has extended through the complexities of modern society the greatest degree of personal liberty ever enjoyed. Relative dormancy has marked the treatment of freedom from arbitrary economic restraint, particularly in the field of business regulation.

Nevertheless, the Court has never abdicated its constitutional function of protecting property and business from arbitrary and discriminatory legislation.

> "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by

> the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." *Shelley v. Kraemer, 334 U. S. 1, 10 (1947).*

The Constitution protects free enterprise, competition, business and property from arbitrary restraint. "As no constitutional guarantee enjoys preference, so none should suffer, subordination or delegation." *Ullman v. United States, 350 U. S. 422, 428 (1955).*

History, reason and the contemporary scene indicate that the distinction between human rights and property rights falsifies reality. Neither can long endure without the other. Without personal liberty, man has no protection in his property. Without property man has no power to exercise his personal liberty. You cannot eat free speech.

> "Life and personal liberty are, no doubt, to be protected by law; but property is also to be protected by law, and is the fund out of which the means for protecting life and liberty are usually furnished. We have no experience that teaches us, that any other rights are safe, where property is not safe."[12]

Laws dealing with personal liberties are as surely adjustments and accommodations of principles to circumstances as are laws regulating business. In either instance, "Liberty implies the freedom from arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interest of the community." *Chicago Ry. v. McGuire, 219 U. S. 549, 567 (1910).*

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[12] *Journal of Debates and Proceedings in the Convention of Delegates Chosen to Revise the Constitution of Massachusetts, 1820 (1853), p. 312.*

Economic turbulance, depression and unbalance have brought forth economic regulation. Political crises, disorders and pressures have brought forth political regulation. The felt necessities of the time in some measure demark the extent to which the state can exercise its power.

The continued existence of a state depends on some degree of flexibility in the limits of state action. In times of military invasion, lovers of liberty might suspend the operation of the civil courts or relocate enemy aliens. Circumstances might permit absolute price fixing, or government operation of private factories. Under the Constitution this Court finally determines whether, under the circumstances, the action is arbitrary.

The evaluation is more difficult in the field of economic liberty because it involves more complex facts and less poignancy. Greater diligence is therefore necessary.

Thomas Jefferson, in his *Notes on Virginia*, first printed in 1785, had decried the introduction of factories into America. Constrained to defend his reversal of position, he said in 1816:

> "But who in 1785 could foresee the rapid depravity which was to render the close of that century the disgrace of the history of men * * * experience has taught me that manufacturers are now as necessary to our independence as to our comfort * * * in so complicated a science as political economy, no one axiom can be laid down as wise and expedient for all times and circumstances * * *."[13]

[13]Letter to Benjamin Austin, January 9, 1816, *The Writings of Thomas Jefferson*, ed. Paul Leicester Ford, Volume 10, p. 10.

So do the circumstances determine when a restriction is arbitrary. In this era of superlegislation, the most regulated people in the world must have some precision, some definitiveness in the mandates governing them. Legislation must approach a solution to the problem it purports to meet.

No jurisdiction under our Constitution has ever prohibited one merchant from meeting the lawful prices of another without regard to differences in circumstances between the two.

## QUESTION TWO

The trading stamp question is relatively simple; the ruling below is palpably arbitrary.

Competing grocers were selling identical grocery items at the same prices, the statutory minimum. They made strictly cash and carry sales. No credit was extended customers. Some grocers gave trading stamps with the sales worth at least 2½% of the sales price and not less than 5% on double-stamp days. Appellant, to meet trading stamp competition, reduced some of its prices by an amount equal to the value of the trading stamps.

The trial court enjoined the meeting of trading stamps by price reductions in an amount equal to the value of the stamps given. It refused to enjoin giving of the stamps with sales at statutory cost. The Supreme Court of Oklahoma

affirmed, saying they "* * * did not constitute a price cut or unfair competition, but that such stamps merely constituted a discount for cash."

Appellees' expert witness, Mr. Peloubet, testified that he knew of no instances in which a retail grocer gave a discount for cash payment excepting the use of stamps. What does it mean when a merchant who sells only for cash gives a discount for cash payment in an industry where such discounts are unknown? Mr. Peloubet, who had testified over the country for the Sperry & Hutchinson trading stamp company, said he saw no difference between giving a stamp and giving its equivalent in cash.

The treatment of the stamp as a cash discount is obviously a fiction. The fact that accountants can treat it several ways does not alter its essential nature. If a grocer can sell ten pounds of sugar for one dollar and give the buyer a trading stamp worth 2½ cents, cannot his competitor meet that price by selling the sugar for 97½ cents? Is a grocer to be forced to give trading stamps because his competitor chooses to, or deny his customers equal value on purchases and himself the advantage of competitive prices? This is what appellant has been forced to do, along with other unwilling grocers in Oklahoma. Today such competition in Oklahoma is relegated to trading stamps. Who has the best stamp?

The question of the trading stamp never occurred to the Oklahoma Legislature. It made no provision for them. Indeed, it made no provision for a cash discount at retail.

Yet the courts below have seen fit to permit the giving of trading stamps with sales made at cost, when it is obvious that their sole purpose is to divert trade. What other inter might be found when their cost is 2% of gross sales, twice the net profit of the industry leaders? How is this cost to be offset?

Moreover, the small grocer cannot afford stamps. Their cost is prohibitive to him. The result is sheer caprice. Nebbia, the Rochester grocer, never even contended that giving a loaf of bread with two quarts of milk sold at the minimum price did not reduce his price below the minimum, nor did he give a piece of paper good for one loaf of bread and call it a discount for cash payment.

The incredible vitality of the trading stamp in today's market is difficult to conceive. In 1955, trading stamp companies grossed in excess of six hundred million dollars.[14] Surveys showed half the families in the country saving stamps.[15] Retailers offering stamps are estimated to have made 12% of all retail sales in the United States in 1957.[16] Supermarkets and other food stores are the largest dispensers of trading stamps.[17] Appeal of the trading stamps to consumers must not be underestimated. "The

[14]"Do Trading Stamps Affect Food Costs?", p. 1, Marketing Research Report No. 147 (Jan. 1957), U. S. Dept. of Agriculture.

[15]"Trading Stamp Practice and Pricing Policy," Albert Haring and Wallace O. Yoder, Interim Release (May 7, 1957), School of Business, Indiana University.

[16]"Who Profits From Trading Stamps?" Eugene R. Beem, Harvard Business Review, Nov.-Dec., 1957, pp. 123-136.

[17]"Trading Stamps," Bureau of Business Research, Indiana University School of Business, Indiana Business Report No. 21, Harvey L. Vredenberg, p. 24.

reasons for strong consumer acceptance of stamps appear to be basically economic. Most stamp savers do not think store prices have been marked up as the result of stamps, so premiums are regarded as an actual plus for the family's well-being."[18]

Volume of sales usually increases substantially when a merchant commences using trading stamps.[19] A recent national survey involving 304 dealers using trading stamps shows the increase in sales attributed to the use of trading stamps in food stores for the first half of 1956 as compared to the corresponding period in 1955. Supermarkets achieved an increase in volume of sales averaging 10.2% where trading stamps were given as compared to a 6.7% average for stores not giving trading stamps.[20] Meeting this stamp competition is an economic necessity. There is a tremendous body of trading stamp literature.[21]

The effect of trading stamps on the grocery industry is evidenced by one of the many full page advertisements run by the Sperry and Hutchinson stamp company in national magazines. On March 24, 1958, that company ran a full

[18]"Who Profits From Trading Stamps," at pp. 125-129, supra, footnote 13.

[19]"Do Trading Stamps Affect Food Costs," p. 2, supra, footnote 12.

[20]"How Trading Stamps Affect Volume and Earnings," J. J. Trout, Progressive Grocer, Vol. 35(8): 48-55 (Aug. 1956).

[21]See, for example, the six-page bibliography in "Trading Stamps," supra, footnote 14, and "Trading Stamp Practice and Pricing Policy," Bureau of Business Research, Indiana University School of Business. Edited by Albert Haring and Wallace O. Yoder. 390 pp.

page ad in Time Magazine, at page 43, which had half-inch headlines proclaiming:

OVER HALF OF THE NON-STAMP SUPERMARKETS HAVE LOWERED FOOD PRICES BECAUSE OF THE TRADING STAMP'S COMPETITIVE PRESSURE

After supporting its statement by a national survey the ad went on to say:

> "At the same time, supermarkets that give stamps have remained competitive within normal price ranges. With increased volume paying for the cost of the stamps in most instances, stamp stores have been able to maintain prices, or even lower them."[22]

Trading stamps seem definitely to be hastening the decline of the small food stores.[23]

In December 1958, the Department of Agriculture issued a report titled "Trading Stamps and Their Impact on Food Prices."[24] Among other things the report stated:

> "Trading stamps are not new; they have been used by retailers as a promotional device for more than half a century. Their phenomenal growth during recent years has been due largely to their wide adoption by food retailers, mainly supermarkets. Because of the importance of food in our daily lives, the question of who actually bears the cost of trading stamps is

[22]Cf. "On Being Fooled by Figures: The Case of Trading Stamps," by Robert H. Strotz, The Journal of Business of the University of Chicago, Vol. 31, No. 4, October 1958, in which the hypothesis that trading stamps have not materially increased prices to the consumer is convincingly challenged.

[23]"Who profits from Trading Stamps?", *op. cit.* pp. 127-8.

[24]U. S. Department of Agriculture, Marketing Research Report No. 295, 42 pp.

one that concerns all of us. This question is one of the most controversial issues in the history of food retailing. [p. 1.]

* * * * *

"Data from these trading stamp companies show that 57 per cent of their total stamp business during 1956 was with grocery stores. Of the estimated $20 billion in retail sales for which trading stamps were issued during 1956, about $11 billion were made by grocery stores. This sales volume represents about 30 per cent of the total retail grocery sales for the United States, reported to be $39.2 billion in 1956. Most of this volume probably was in supermarkets. The Bureau of Labor Statistics, in a survey among its sample stores during August 1956, found that about 42 per cent of the chain and large independent stores in the sample were offering stamps but only 12 per cent of the small independent food stores were doing so. [pp. 6, 7.]

* * * * *

"CONCLUSIONS

"The total cost of trading stamps used by food stores was about the same in 1957 as it was in 1956 (about $200 million) and it is not expected to be much different in 1958. The advocates of trading stamps claim that stamps more than pay for their cost through reduced charges resulting from increased sales and greater competition. Others believe that the cost of stamps to retail food stores is primarily covered by increased food prices. This study does not fully support either view, but instead, indicates that the cost of stamps was covered in part by reduced costs resulting from increased volume, in part by higher prices, and in part by a decline in profit per dollar of sales.

"Wide variations were found among stores with respect to the effect of stamps. The first stores to take on stamps in a particular area usually use stamps as a competitive device which they hope will increase sales and thereby decrease costs enough to offset the

additional cost of stamps. Some stores adopt stamps as a defensive measure to meet competition of others who give stamps. Stores not using trading stamps as a competitive device may emphasize lower prices to hold present customers and to attract new ones. In some instances, stamp competition is met by giving premiums in ways other than through stamps and by other promotional devices." Pp. 27, 28.

Trading stamps have suffered a long litigious history. They have had detractors and champions. In sympathy with appellee's director Kamp and appellant's former president, Warren, might be found Mr. Justice McKenna who characterized stamps as "* * * an appeal to cupidity lure to improvidence" and "* * * as having the seductive appeal * * *" of a lottery. *Rast v. Van Deman, 240 U. S. 342, 360 (1916).* More often the merchant simply prefers to limit his activity to the commodities in which he deals and to offer the best services and prices within that realm. Stamps are expensive. To be effective they must be advertised and wanted. If the customer does not make his purchases at the store in order to get the stamps, they are a handicap to the merchant. The merchant pays for the stamps whether the customer wants them or not.

Cases which have sustained legislation directly prohibiting trading stamps or placing prohibitive taxes on them include: *Rast v. Van Deman, op. cit.; Tanner v. Little, 240 U. S. 369 (1916); Pitney v. Washington, 240 U. S. 387 (1916); Gambel v. Montgomery, 39 So. 353 (1905); Lansburgh v. District of Columbia, 11 App. D. C. 512 (1897); District of Columbia v. Kraft, 35 App. D. C. 253 (1910), cert. denied 218 U. S. 673 (1910); District of Columbia v.*

*Gregory, 35 App. D. C. 271 (1910), cert. denied, 218 U. S. 673 (1910); Sperry & Hutchinson Co. v. State, 122 N. E. 584 (1919); State v. Wilson, 168 Pac. 679 (1917); State v. Crosby Bros., 176 Pac. 321, 670; State v. Merchants Trading Co., 38 So. 443 (1905); State v. Underwood, 71 So. 513; State v. J. M. Seney Co., 107 Atl. 189; Fleetwood v. Read, 58 Pac. 665 (1899); Oilure Mfg. Co. v. Pidduck-Ross Co., 80 Pac. 276 (1910); Sperry & Hutchinson Co. v. Tacoma, 122 Pac. 1060 (1912); Sperry & Hutchinson Co. v. Melton, 71 S. E. 19 (1911); State ex rel. Sperry & Hutchinson Co. v. Weigle, 166 N. W. 54 (1918).* As many cases have invalidated such legislation.

During 1957 roughly 100 bills concerning trading stamps were introduced in the legislatures of 35 states of the 43 which had legislative sessions that year. Four states enacted laws affecting the stamps. Kansas prohibited their use, following the District of Columbia which had done so years ago. Cf. *Lansburgh v. District of Columbia, op. cit.; District of Columbia v. Kraft, op. cit.*

While the courts have disagreed, it is difficult to see how it can be said that trading stamps do not reduce prices if substance takes precedence to form.

This Court in *Rast v. Van Deman, 240 U. S. 342, 360 (1916)*, said:

> "* * * all of the schemes have a common character,—something is given besides that which is or is supposed to be the immediate incentive to the transaction of sale and purchase—something of value given other than it * * *."

The proposition was forcefully stated by the New York Court of Appeals in the following terms:

> "No matter how one puts it, the customer who is accorded a cash discount in reality pays that much less for the article which he purchases, and this is nonetheless true, because the return is by way of merchandise rather than coin which may purchase merchandise." *Bristol-Meyers v. Picker, 96 N. E. 2d 177, 179 (Ct. App. N. Y. 1950).* See also, *Colgate-Palmolive Company v. Max Dichter & Sons, 142 F. Supp. 545 (D. C. Mass. 1956).*

The essential nature of the conduct cannot be changed by calling trading stamps a discount for cash.

This point was convincingly made by Mr. Justice Jackson for the four dissenters on the Oklahoma Supreme Court where he said:

> "Reasons which compel an accountant's conclusion do not compel the same legal conclusion. The issues are not the same."

See also, *Colgate-Palmolive Company v. Elm Farm Foods Co., 148 N. E. 2d 861 (Sup. Jud. Ct. Mass., 1958)*, wherein the court said:

> "There is no magic in the words 'cash discount'. When subjected to analysis they are merely an euphemism for what is in reality a price cut."

What lawyer would argue with Mr. Justice Holmes' legal analysis of the trading stamps as "* * * a draft upon another merchant, payable in goods * * *"? *Commonwealth v. Sisson, 60 N. E. 385 (Mass. 1901).* Of course, in many instances the draft is on the merchant giving it and is sometimes payable in cash.

Every argument made under Question One of this brief applies to the trading stamp issue because appellant was doing no more than meeting prices. Appellant was enjoined from meeting prices, while the Court refused to enjoin continued sales at price it was meeting. The ruling "* * * virtually forces competitors to use trading stamps." *Competition From Retailers Issuing Trading Stamps Cannot be Met by Price Reductions Equivalent to Value of Stamps. 36 Texas Law Review 691, 694.* For some reason, or more accurately for no reason, Oklahoma now restricts discounts for prompt payment of cash given by retailers to the media of trading stamps and other evidences of credit and prohibits the meeting of the price which results from use of the trading stamp.

The question for this Court is whether there is a difference between trading stamps and other methods of giving discounts for cash which justifies permitting the former and prohibiting the latter. The only possible distinction between the two prices is that appellant has given the "customary" discount for cash in the customary way, a net price for cash payment.

The way in which the question has arisen tends to obscure a clear focus of the problem. The question is identical with the question which would arise if the legislature of the State of Oklahoma had said, "Retailers may give trading stamps and other evidences of credit in connection with the sale of goods at retail at statutory cost as a discount for the prompt payment of cash; provided that the discount cannot be given

in any other way; further provided that a price discounted below statutory cost cannot be met."

Is the action of Oklahoma arbitrary, or discriminatory?

Why should the housewives of Oklahoma be denied the right to buy at the lowest net price prescribed by the legislature? Why should they be forced to buy with what they want, a trading stamp? Why should the merchants be driven to use trading stamps? Why should they be denied the right to give the type of discount they choose? Why should the trading stamp companies be granted, as a practical matter, a state monopoly of the cash discount business?

What policy was the legislature attempting to adopt in connection with cash discounts on sales at retail? The answer is clear. None. As the four dissenting Justices below said, "The Act does not authorize discounts for cash in retail sales." What justification is there for this discrimination?

## QUESTION THREE

The State of Oklahoma, through judicial interpretation, now permits discounts for the prompt payment of cash in the form of a trading stamp. In so acting, it creates more problems than it solves. There is no fixed value to a trading stamp. Use of stamps can easily destroy the efficacy of the statute. Once permitted, they must then be regulated; otherwise the merchant can give a discount of any value he might choose. The present regulation is piecemeal. "Equal

protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer, op. cit.* The trial court here fixed a limit on the value of trading stamps that appellant might give at 3%. Competitors are not limited to any fixed percentage. "[T]he equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo v. Hopkins, 118 U. S. 356, 369 (1885).* Such protection is wanting here.

> "For if * * * power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to the reasonableness by the various courts called upon to consider the subject as an original question * * *. [T]he existence of such a power in the courts * * * would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discriminations, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted." *Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 440-441 (1906).*

There is no equal protection here; instead, appellant alone is placed under this prohibition. It is inconceivable that every district court in the State could arrive at the 3% figure imposed upon this appellant in the cases which come before them.

The Supreme Court of Oklahoma with benign intent approved the giving of single trading stamps in the usual

manner and the injunction against the double stamps. The pronouncement can have no force. What is a single stamp? Its value has no limitation and the number given with a purchase is variable. To the trade it can only mean that you cannot give twice as much on one day as on another. While appellant is limited to 3%, it is alone in this respect. Its competition can give one stamp with each penny of purchases or with each ten dollars. It can affix a value to its stamps of a thousandth of a cent or a dollar.

Relegated to competition in the arena of trading stamps, each Oklahoma merchant must seek the most attractive stamp. That the pulling power of stamps varies tremendously is unquestionable.

> "One study covered the service stations associated with an oil company in the San Francisco Bay area in early 1956 before stamps were an important factor in grocery retailing. While 36% of this company's associated stations gave stamps, over half gave the only widely distributed stamp, S & H Green Stamps, and the rest gave a variety of others. Stations using S & H stamps were pumping 45% more gasoline than the average for all stations. Those with other stamps were 4% above the total average; and those without stamps ran 15.5% below the total average. Some of the stations with stamps, however, were below average, and some without stamps were above average." *Who Profits From Trading Stamps, op. cit., p. 125.*

The redemption value of the stamp coupled with the extent to which it is known and advertised is the measure of its effectiveness.

The bulk of the trading stamp business is concentrated in a few large companies. Ten of the largest trading stamp companies accounted for about 70 per cent of the business during 1956.[25] When a merchant contracts with one of these large companies his competitors are foreclosed from that stamp. They must find a comparable stamp or initiate their own. It is difficult for the merchant giving his own stamp to compete with stamps which can be secured in grocery stores, drug stores, department stores, laundries and dry cleaners, gasoline stations, hardware stores and practically every type of retail and some service establishments.

The wholly arbitrary and capricious discriminations which permeate this Act are inconsistent with due process and equal protection.

"Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Louisville Gas & E. Co. v. Coleman, 277 U. S. 32, 37 (1928).* Quoted with approval in *Morey v. Doud, op. cit., p. 464.*

Moreover, violation of this Act is a misdemeanor punishable by a fine. Yet no merchant in Oklahoma can know whether his price is in violation of the Act because the Act affords him no opportunity to determine whether a discount for cash that he might give in connection with a

[25]Trading Stamps and Their Impact on Food Prices, op. cit., p. 2.

sale at retail is within the limits that a court might later fix on the discount. This Court has said:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process at law." *Connally v. General Construction Co., 269 U. S. 385 (1926).*

## QUESTION FOUR

The Constitution of the United States and the Laws made in pursuance thereof are the Supreme Law of the Land, the laws of any state to the contrary notwithstanding. *Article VI, Clause 2, of the Constitution of the United States.*

Construing this clause, Chief Justice John Marshall stated:

> "The nullity of any act, inconsistent with the constitution is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress,

or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." *Gibbons v. Ogden, 9 Wheaton 1, 210-211 (1824).* Cf. *Sinnot v. Davenport, 22 Howard 227 (1859).*

This principle has been followed in scores of important decisions through the years. Determination of the relationship of federal and state power within the field of labor regulation has been most active recently. Cf. *Hill v. Florida, 325 U. S. 538 (1945); Garner v. Teamster C & H Union, 346 U. S. 485 (1953); United Construction Workers v. Laburnum Construction Corp., 347 U. S. 656 (1954); Weber v. Anheuser-Busch, 348 U. S. 468 (1955); Guss v. Utah L. R. B., 353 U. S. 1 (1957); International Union, U. A., A. & A. I. W. v. Russell, 356 U. S. 634 (1958).*

The question here is whether the Oklahoma Unfair Sales Act, as applied, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in passing the federal antitrust laws. *Hines v. Davidowitz, 312 U. S. 52, 67 (1941).* Can this Act and the federal antitrust laws "move freely within the orbit of their respective purposes without infringing upon one another?" *Union Brokerage Co. v. Jensen, 322 U. S. 202, 207 (1944).*

The Oklahoma Act "* * * so far as it affects interstate commerce even indirectly and incidentally, can have no validity if repugnant to the Federal regulation." *Savage v. Jones, 225 U. S. 501, 529 (1912).*

Illustrative of the application of the rule is *McDermott v. Wisconsin, 228 U. S. 115 (1913)*, which involved the conflict between the federal Food and Drugs Act of 1906 and a Wisconsin statute regulating, among other things, the branding and labeling of syrups and molasses for the protection of the public health. This Court found "the object of the statute is to prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food * * *." *McDermott v. Wisconsin, op. cit., p. 131.* The Court pointed out that federal authority, for the sake of efficiency in protecting the public against misbranding in interstate trade, extended far enough to regulate labeling on packages while being offered to consumers, and that the federal statute tolerated the more euphemistic label prohibited by the state. The Court went on to say "conceding to the State the authority to make regulations consistent with the Federal law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a state to discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal statute which have accrued both to the government and the shipper, and to impair the effect of a Federal law which has been enacted under the Constitutional power of Congress over the subject." *McDermott v. Wisconsin, op. cit., 133-134.*

In *Napier v. Atlantic Coast Line R. Co., 272 U. S. 605 (1926), at p. 613*, Mr. Justice Brandeis, speaking for a unanimous Court, said:

> "Because the standard set by the commission must prevail, requirements by the states are precluded, however commendable or however different their purposes."

This decision enjoined the enforcement of a Georgia statute which prescribed an automatic door to the fire box in locomotives. The Federal Locomotive Boiler Inspection Act prevailed.

"When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield." *Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173, 176 (1942).*

What is the scope and policy of the federal antitrust laws involved? The Sherman Act, *15 U. S. Code, et seq.*, prohibits among other things contracts, combinations, and conspiracies in restraint of trade or commerce, monopolization, attempts to monopolize, and combinations and conspiracies to monopolize any part of interstate trade or commerce. "* * * Congress, in passing the Sherman Act, left no area of the constitutional power unoccupied; it 'exercised all the power it possessed.' *Apex Hosiery Co. v.*

*Leader, 310 U. S. 469, 495." United States v. Frankfort Distilleries, Inc., 324 U. S. 293, 298 (1945).* "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprises or through particularization defeat its purposes by providing loopholes for escape." *Appalachian Coals v. United States, 288 U. S. 344, 359-360 (1933).* "The Sherman Act is concerned with more than the large, nation-wide obstacles in the channels of interstate trade. It is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved." *United States v. Yellow Cab Co., 332 U. S. 218, 226 (1947).*

While it is true that the Sherman Act does not specifically prohibit the states from enacting statutes that effect restraints in trade or monopolization or have such a tendency, the Sherman Act is vitiated by such legislation. State action can be as great a threat to competition as private action. Although Mr. Justice Reed was writing on the conduct of private citizens, the following statement is equally applicable to legislation by a state:

> "* * * it is crystal clear from the legislative history and accepted judicial interpretations of the Sherman Act that competition on prices is the rule of congressional purpose and that where exceptions are made, Congress should make them." *United States v. Line Material Co., 333 U. S. 287, 309-310 (1948).*

In *Schwegmann Bros. v. Calvert Distillers Corp., 341 U. S. 384 (1951),* the Louisiana Fair Trade Act, with

its non-signer clause, was held unenforceable against a retailer who refused to agree to the price-fixing scheme of a manufacturer. The Miller-Tydings Act, an amendment to Section 1 of the Sherman Act, provides "nothing herein contained shall render illegal contracts or agreements prescribing minimum prices for the resale" of specified commodities "when contracts or agreements of that description are lawful as applied to intrastate transactions" under local law. *15 U. S. Code 1.* Schwegmann refused to sign such a contract. Calvert attempted to enjoin Schwegmann from selling Calvert products at less than the minimum prices it established by virtue of the nonsigner clause in the Louisiana Act. The state law was held to conflict with the Sherman Act to the extent that it attempted to legalize the enforcement of price-fixing agreements against nonsigners. It yielded to the superior force of the federal act. See, the McGuire Fair Trade Act, *15 U. S. Code 45.*

The Oklahoma Unfair Sales Act prohibits sales below an arbitrarily determined price in certain cases. This price is the same for nearly all comparable merchants. These merchants are further prohibited from meeting certain lawful competitive prices. These prohibitions are manifestly in conflict with the policy of the Sherman Act.

"It is a familiar doctrine that the prohibition of a federal statute may not be set at naught or its benefits denied by state statutes or state common law rules." *Sola Electric Co. v. Jefferson Electric Co., op. cit., p. 176.* In this case the Court held that a patent licensee is not estopped to challenge a price-fixing clause in his license agreement by

showing that the patent is invalid. It was contended that state law prohibits a party who accepts a license under a patent from denying its validity. Such local rules must yield to the Sherman Act. Agreements fixing competitive sales prices which are not within the protection of a patent are unlawful because prohibited by the Sherman Act. The patent may therefore be challenged.

Clearly within the purpose of the Sherman Act, the question becomes whether the specific conduct involved is within its scope. As to this there can be little doubt. See *Swift & Co. v. United States, 196 U. S. 375 (1905); Binderup v. Pathe Exchange, 263 U. S. 291 (1923); Lorain Journal Co. v. United States, 342 U. S. 143 (1951).* These cases stand for the proposition that once goods enter the stream of commerce they remain a part of the flow until they reach their intended and ultimate destination. The activities of interstate chains, as of all retail grocers, are directed toward the retail sale.

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In *United States v. International Boxing Club, 348 U. S. 236 (1955), at p. 241,* this Court stated:

> "A boxing match—like the showing of a motion of a motion picture * * * or the performance of a vaudeville act * * * or the performance of a legitimate state attraction * * *—'is of course a local affair' but that fact alone does not bar application of the Sherman Act to a business based on the promotion of such matches, if the business is itself engaged in interstate commerce * * *."

That the federal antitrust laws have such a direct bearing on the subject matter of the Oklahoma Unfair Sales

Act as to preclude the operation of that Act within the scope of the federal acts, is further illustrated by the Robinson-Patman and Federal Trade Commission Acts. The Robinson-Patman Act in part provides, "It shall be unlawful for any person engaged in commerce in the course of such commerce * * * to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." *15 U. S. Code 13a.* A violation is punishable by fine and imprisonment.

Congress intended to include retail sales by interstate chains within the coverage of this Act. *Senate Resolution 244, 70th Congress*, directed the Federal Trade Commission to make a comprehensive study of chain store operations. The final report of the chain store investigation *(Senate Document No. 4, 74th Congress, 1st Session)* contained a detailed study of the history and operation of the chain stores. In discussing certain unfair methods of competition used by some chains, the report stated:

> "The competitive advantage of chains over single-store competitors, arising from the fact that chains do business in many localities, is most aggressively pursued on those occasions when chains cut their prices locally below the prices of their competitors in that locality, while maintaining prices in their other stores." Page 34.

It is against this background that the statute was enacted.

In *Moore v. Mead's Fine Bread, 348 U. S. 115 (1954)*, Mr. Justice Douglas, speaking for a unanimous Court stated:

> "We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources * * * the prices on the interstate sales * * * are kept high while the local prices are lower. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price-cutting campaigns * * * Congress, as guardian of the Commerce Clause, certainly has the power to say that those advantages shall not attach to the privilege of doing an interstate business * * *. It is, we think, clear that Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business outlawing the price-cuting employed by respondent." *Moore v. Mead's Fine Bread, op. cit., pp. 119-120.*

Cf. *Standard Oil Co. v. F. T. C., op. cit.*

It is apparent that both state and federal governments have attempted to regulate the same subject matter; that they are in irreconcilable conflict. The right to meet the

equally low price of a competitor conferred by the federal statute is denied by the state. Many prices below the statutory cost defined in the Oklahoma Act would not be unreasonably low under the Robinson-Patman Act.

The federal acts are rendered lifeless by the state.

The Federal Trade Commission Act outlaws "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." *15 U. S. Code 45.* The Commission enforces certain of the federal antitrust laws. Pursuant to the powers delegated it by Congress, the Commission has established extensive trade practice conference rules to effectuate the purposes of the antitrust laws. Included in these rules are prohibitions against wrongful selling below cost. See *Grocery Industry Conference Rules, Section 209.11; 16 C. F. R. 209; 17 F. R. 2357, Effective February 17, 1952.* Because of powers delegated to the Secretary of Agriculture under the Packers and Stockyards Act *(7 U. S. Code 181 et seq.)*, jurisdiction of the Commission over retail sales by grocers packing, processing and handling substantial quantities of meat was limited. See, *15 U. S. Code, 45(a)(6).* The limitation was removed and clear Congressional intent to cover retail sales of grocery chains was shown by amendment to the Packers and Stockyards Act of September 2, 1958:

> "(a) The Federal Trade Commission shall have power and jurisdiction over any matter involving meat, meat food products, livestock products in un-

manufactured form, or poultry products, which by this chapter is made subject to the power or jurisdiction of the Secretary, as follows:

"(2) In any investigation of, or proceeding for the prevention of, an alleged violation of any Act administered by the Commission, arising out of acts or transactions involving meat, meat food products, livestock products in unmanufactured form, or poultry products, if the Commission determines that effective exercise of its power or jurisdiction with respect to retail sales of any such commodities is or will be impaired by the absence of power or jurisdiction over all acts or transactions involving such commodities in such investigation or proceeding." *7 U. S. Code 127.*

It seems apparent that Oklahoma had no jurisdiction over the subject matter of this cause. The facts involved, falling within the sphere of the federal antitrust laws, are subject to the exclusive authority of those laws. The Oklahoma Unfair Sales Act standing as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress must yield.

The permanent injunction appealed from constitutes a continuing interference with the federal antitrust laws and an exercise of judicial power without jurisdiction of the subject matter. In denying appellant rights protected by federal law, the injunction violates due process and equal protection of the laws.

## CONCLUSION

For the reasons stated it is respectively submitted that the judgments of the courts below should be reversed and the permanent injunction vacated.

Respectfully submitted,

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## PROOF OF SERVICE

I, Ramsey Clark, one of the attorneys for Safeway Stores, Incorporated, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of March, 1959, I served copies of the foregoing Brief on the Merits on the several parties thereto, as follows:

On Oklahoma Retail Grocers Association, Inc., a corporation, and Louie J. Speed, Inc., a corporation, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to their respective attorneys of record, as follows:

Miskovsky & Miskovsky, Hightower Building, Oklahoma City, Oklahoma;

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